IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 205

IN RE CLYDE WILSON SUMMERS,

Petitioner.

THE RETURN OF THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF ILLINOIS TO THIS COURT'S RULE TO SHOW CAUSE IN THE ABOVE ENTITLED MATTER; AND BRIEF IN SUPPORT OF THE RETURN.

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Now come William J. Fulton, Chief Justice of the Supreme Court of Illinois, and Clyde E. Stone, Francis S. Wilson, Walter T. Gunn, Loren E. Murphy, June C. Smith and Charles H. Thompson, Associate Justices of the Supreme Court of Illinois, and by this their return to this court's order and rule heretofore entered on the 9th day of October, A. D. 1944, and spread of record in the above entitled matter, the said Chief Justice and the said Associate Justices of the Supreme Court of Illinois respectfully show cause why the supposed and alleged record in this proceeding should not be certified in this court and also why the petition for a writ of *certiorari* herein should not be granted.

As and for their said return in this behalf, the said Chief Justice and the said Associate Justices respectfully state as follows:

I.

Under the Constitution of the State of Illinois as expounded by the Supreme Court of Illinois, all matters pertaining to the right to admission to the bar of Illinois and the right to practice law are subject to regulation by the Supreme Court of Illinois, to the exclusion of any power in the legislature to pass any act or statute in conflict with or in derogation of such jurisdiction of the Supreme Court of Illinois. (*In re Day*, 181 Ill. 73.)

In the exercise of its jurisdiction in the premises, the Supreme Court of Illinois has adopted and promulgated, as Rule 58 of the Rules of Practice and Procedure of the Supreme Court of Illinois, a rule governing the qualifications, manner of application for and mode of admission to the bar of the State of Illinois. The entire text of such rule is set forth in full as Appendix I to the brief filed in support of this return. (*Post*, page 31.) Pertinent excerpts from the said rule are here set forth.

In and by Section I of the said Rule 58, it is provided as follows:

> "Persons may be admitted to practice as attorneys and counselors-at-law in this State if they are citizens of the United States, at least twenty-one years of age, of good moral character and have satisfactorily passed an examination before the Board of Law Examiners or have been licensed to practice law in another state, territory, the District of Columbia or in certain foreign jurisdictions. All subject, however, to the terms and requirements hereinafter contained in this rule."

Sections II, III and IV of the said rule have to do with the appointment of bar examiners, the prescription of gen-

eral academic and formal educational requirements, and qualification upon bar examinations.

Section V of the said rule pertains only to attorneys from other states seeking admission to the bar of Illinois.

Section VI of the said rule pertains only to fees of applicants.

Section VII of the said rule pertains only to the recognition of attorneys from other states in isolated cases.

Section VIII of the said rule pertains only to matters concerning qualifications under prior rules.

Section IX of the said rule is as follows:

"1. At the November term in each year, the Supreme Court shall appoint a Committee on Character and Fitness in each of the Appellate Court Districts of this State, consisting of not less than three members of the Bar. The members of the Board of Law Examiners appointed for their respective districts shall be *ex-officio* members of the Committee.

"2. Before admission to the Bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. He shall furnish the Committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history and environments, together with the affidavits of at least three reputable persons personally acquainted with him residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based. Each applicant shall appear before the Committee of his district or some member thereof and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the Bar.

"3. If the Committee is of the opinion that the applicant is of approved character and moral fitness,

it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the Bar."

Section X of the said rule pertains only to the power to make rules, investigations and subpoena witnesses.

The petitioner in the instant case applied to the Committee on Character and Fitness of the Third Appellate District of Illinois for a certificate to the Supreme Court of Illinois that he was of approved character and moral fitness. This certificate was denied the petitioner by that committee. Under the organic law of Illinois as expounded by the Supreme Court of Illinois, admission to the bar of Illinois constitutes the appointment of the applicant an officer of the court: The petitioner having failed to procure the certificate that he was of approved moral character and fitness required by the Supreme Court of Illinois as a prerequisite to appointment as an officer of the court, petitioner's application for a license to practice law was denied.

The petitioner petitioned the Supreme Court to reconsider its determination in the premises. The Justices of the Supreme Court treated the petition as an informal application for a reconsideration of their determination not to constitute petitioner an officer of the court by granting him a license to practice law. The correspondence and communications of the petitioner with the Justices of the court have not been spread of record in the said court and, under the laws of Illinois as expounded by her Supreme Court and under the practice of that court, do not constitute or comprise the record of any case or controversy pending in the Supreme Court of Illinois.

The Supreme Court of Illinois, in treating the petitioner's application for admission to the bar as a mere application and not as a judicial proceeding, acted in accordance with

its invariable practice and did not apply any rule to petitioner's matter other than or different from the rule that it would apply in any other or similar case.

II.

The Chief Justice and the Associate Justices respectfully show that the petitioner's application for admission to the bar did not and does not constitute a case or controversy, either within the purview of the law of Illinois or within the purview of the Constitution and laws of the United States of America. Therefore it is respectfully asserted that there is no justiciable case or controversy which can be reviewed by this court in the exercise of its constitutional or statutory appellate jurisdiction, as distinguished from its original jurisdiction.

But if petition to this court for the writ of *certiorari* be deemed not a proceeding in its nature appellate but as an attempt to institute an original proceeding in this court, then it is respectfully asserted that such petition, when so considered and construed, must be deemed to constitute an attempt to institute an original case or controversy against the State of Illinois, in violation of Illinois' sovereign immunity to such cases or controversies at the instance of a citizen.

Therefore it is respectfully submitted that no case or controversy was pending in the Supreme Court of Illinois, wherefore no appellate proceeding can be maintained or conducted in this court; and that no original proceeding can be entertained in this proceeding in the premises without violating the immunity of the State of Illinois.

III.

Although the respondents submit, for the reasons above set forth, that their acts and determinations in the premises are not subject to review either by appellate proceedings or by original proceedings in this court, and although they submit that they are not bound to answer the petitioner's assertions that the sole basis for denying him a license to practice as an officer of the court was that he claimed to be a conscientious objector to military service, nevertheless the Chief Justice and the Associate Justices of the Supreme Court of Illinois say that, if it be supposed that the action of the court in the premises is subject to review in this proceeding and if it be further supposed that the sole ground for refusing the petitioner admission to practice as an officer of the court was his profession of conscientious objection to military service, nevertheless such refusal could not be deemed arbitrary or unreasonable because all applicants for admission to the Illinois bar are required to take an oath to support the Constitutions of the United States of America and of the State of Illinois; and the petitioner could not take such an oath in good faith because the Constitution of the State of Illinois is expressly so drawn as to require military service of all able-bodied male persons resident in the state between the ages of eighteen and forty-five unless exempted by the laws of the United States or of the State of Illinois, the Constitution of Illinois further providing in substance that in time of war, conscientious objection to military service shall not exempt the citizen from such service.

Sections 1 and 6 of Article XII of the Constitution of the State of Illinois are, respectively, as follows:

> "The militia of the state of Illinois shall consist of all able-bodied male persons resident in the state, between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, exempted by the laws of the United States, or of this state." (*Constitution of Illinois*, Art. XII, Sec. 1.)

> "No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: *Provided*, such person shall pay an equivalent for such exemption." (*Constitution of Illinois*, Art. XII, Sec. 6.)

It does not appear that petitioner, in his application for admission to the bar of Illinois, made any showing that he would serve the United States or the State of Illinois in time of war, notwithstanding his conscientious objections, if the federal government should fail to continue its policy of exempting conscientious objectors or if Illinois should require his services in her militia without regard to his religious affirmations.

It is further shown to this Court that even though Congress may see fit to grant a temporary exemption from military service to conscientious objectors, such exemption can be withdrawn at any time; moreover, it appears that the militia may be called in time of war according to the laws of the State of Illinois, there being no exemption from state military service upon the ground of conscientious objection in time of war; wherefore, the Supreme Court of Illinois did not act arbitrarily, but acted in accordance with the laws and Constitution of the State of Illinois when it refused to grant a license to the petitioner to practice law.

Wherefore, the Chief Justice and the Associate Justices of the Supreme Court of Illinois respectfully pray that the rule heretofore entered in this behalf may be discharged and that the petitioner's petition may be dismissed.

Respectfully submitted,

WILLIAM J. FULTON,
Chief Justice of the Supreme Court of Illinois,
CLYDE E. STONE,
FRANCIS S. WILSON,
WALTER T. GUNN,
LOREN E. MURPHY,
JUNE C. SMITH,
CHARLES H. THOMPSON,
Associate Justices of the Supreme Court of Illinois,

By GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for the Respondents.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

William C. Wines, being first duly sworn upon his oath, deposes and says that he is an Assistant Attorney General of the State of Illinois, that the Justices of the Supreme Court of Illinois have requested the Attorney General of the State of Illinois to prepare and present the foregoing return and the brief in support thereof, that this affiant has read the foregoing return, that he knows the contents thereof, that the same are true and that he makes this affidavit by the authority of the Attorney General of the State of Illinois.

Subscribed and sworn to before me this 6th day of November, A. D. 1944.

Notary Public.

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SUMMARY OF ARGUMENT.

I. The justices submit that this court can not review the instant matter by the issuance of a writ of *certiorari* because:

First: This court's *appellate* jurisdiction can not be sustained because the matters pending in the Supreme Court of Illinois did not constitute a "case or controversy" within the purview of the constitutional provisions creating this court and measuring its jurisdiction.

Second: This court's *original* jurisdiction can not be invoked to sustain this petition because to entertain the instant petition as adversary litigation original in this court would violate Illinois' immunity to suit.

Third: The right to admission to the bar is neither a privilege nor an immunity nor liberty nor property within the purview of the fourteenth amendment.

II. Although the justices respectfully deny the existence of this court's jurisdiction in this matter, nevertheless, if such jurisdiction can be supposed to exist, they submit:

First: This court has held, even without express declaration of Congress, that a foreign-born citizen can not obtain American citizenship without taking an unreserved and unconditional oath to render military service in time of war. (*United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 644.) Since petitioner, if he were not native born, could not even obtain American citizenship, *a fortiori*, the Supreme Court of Illinois did not act arbitrarily and unreasonably in holding that one who, according to this court's decisions, has not the requisite character for American citizenship, likewise lacks the requisite character for admission to the bar of Illinois.

Second: The Constitution of Illinois declares all able-bodied male persons between the ages of eigh

teen and forty-five, to be members of the militia and clearly provides that there shall be no constitutional right to oppose religious scruples, even if sincere, to State militia service in time of war unless Congress of the State of Illinois shall so declare. The constitutional privilege is conditional upon existing and continued legislative indulgence. Petitioner does not show that his religious scruples are thus conditional and that they would yield to withdrawal of the privilege, which withdrawal is explicitly contemplated by Article XII of the Constitution of Illinois.

Applicants for admission to the bar of Illinois are required to take an oath to support the Constitution of the State of Illinois. The Supreme Court of Illinois did not act arbitrarily or unreasonably when it denied a license to a man who could not conscientiously respect both his religious convictions and his oath to support the Constitution of Illinois.

Third: Notwithstanding petitioner's argument to the contrary, Congress has not expressly declared the slightest solicitude for the religious convictions of those who otherwise would be subject to compulsory military duty. On the contrary, the exclusion of the conscientious objectors from military service, like the exclusion of clergymen, exconvicts, those engaged in essential civilian activities, those with extraordinary family responsibilities, those ridden with disease, illiterates and feebleminded persons, is dictated, not by regard for the individual, but by considerations of military expediency. It does not appear that petitioner is exempted because of regard for his creed. Rather he is exempted because it is the sense of the Congress that he would not make a fit soldier. Therefore petitioner has no basis for his claim of congressional recognition of his private religious beliefs.

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STATEMENT OF THE CASE.

The facts which would be disclosed by the certification of the correspondence between petitioner and the Justices of the Supreme Court of Illinois, if such correspondence could be deemed the record of a judicial proceeding and subject to certification to this court as such record, have been fully set forth in the foregoing return to this court's rule to show cause. For the purpose of poising the only questions that can be deemed to be raised by the instant petition, those facts may be summarized as follows:

Petitioner, having passed the Illinois State bar examination conducted under order of the Supreme Court of Illinois, applied for the certificate of good moral character required by the rules of the Illinois Supreme Court for admission to the bar. He was refused such certificate, it being assumed for the purposes of this petition that the sole basis for such refusal was the fact that he had asserted conscientious objection to compulsory military service.

Article XII of the Constitution of Illinois declares "all able bodied male persons between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, exempted by the laws of the United States, or of this state," to be members of the "militia of the State of Illinois." That article further provides that "no person having conscientious scruples against bearing arms shall be compelled to do militia duty **in time of peace.**" An oath to support the Constitution of the State of Illinois is a prerequisite to admission to the Bar of Illinois.

Petitioner requested the Supreme Court of Illinois to admit him to the Illinois Bar notwithstanding his failure

to obtain the required certificate of good moral character. This the Illinois Supreme Court refused to do.

The Illinois Supreme Court has not, either in the case of petitioner, or in the case of any other applicant for admission to the bar, treated applications for admission to the bar as a "case or controversy" pending in the Supreme Court of Illinois. By informal action of the justices, petitioner has been denied a license to practice law in Illinois.

THE QUESTIONS PRESENTED.

I.

The first question presented is whether this court has jurisdiction to review this matter upon the issuance of this court's writ of *certiorari*. This question involves the following two subsidiary inquiries:

First: Can this court's jurisdiction in the instant matter be sustained as *appellate* jurisdiction, which implies inquiry as to whether the matters occurring in the Illinois Supreme Court constitute a "case or controversy" determined in that court and subject to *appellate* review?

Second: If appellate jurisdiction cannot be predicated upon the proceedings in the Illinois Supreme Court, then can this court's *original* jurisdiction be invoked without violation of Illinois' sovereign immunity to suit by citizens?

II.

Although the Justices submit that neither appellate nor original jurisdiction of this court can be sustained in this matter, nevertheless if it be assumed that such jurisdiction can be sustained, the further question arises whether the petitioner has presented a substantial federal question.

The only federal question that he seeks to present is *not* the question whether, in this court's discretion, he should be admitted to the bar of Illinois, but whether this court can declare that the Illinois court acted unreasonably and arbitrarily in denying him admission to the bar when such admission entails the requisite of the taking of an oath to support the Constitution of Illinois, and the Illinois Constitution in substance provides that there is no constitutional right to oppose conscientious scruples to military service in time of war.

ARGUMENT.

I.

The action of the Supreme Court of Illinois is not subject to review in this proceeding.

Although where this court's jurisdiction exists at all, it is necessarily supreme, nevertheless that jurisdiction, since it derives ultimately from the Constitution of the United States, depends upon the presence of a "case or controversy," within the purview of the provisions of the Constitution of the United States which either directly create or authorize creation by Congress of federal courts, and which either directly confer or authorize the congressional bestowal of jurisdiction upon such courts. (*The Constitution of the United States*, Article III.)

In *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, this court held that the existence of a "controversy" or "case" was an indispensable prerequisite to the existence of federal jurisdiction. That holding of course is merely declaratory of Article III of the Constitution itself.

This court's appellate jurisdiction cannot be sustained because petitioner's application to the Supreme Court of Illinois did not constitute a "case or controversy" in that court.

This court's jurisdiction must necessarily be either appellate or original. A prerequisite to the existence of either appellate or original jurisdiction is the existence of a "case or controversy". Appellate jurisdiction can be predicated only upon the existence of a "case or controversy" in a court of subordinate jurisdiction. Therefore, if appellate jurisdiction is to be sustained in the instant case, there must have existed a "case or controversy" in

the Supreme Court of Illinois which is subject to review under this court's statutory powers.

The petitioner's application to the Supreme Court of Illinois for admission to the bar of Illinois cannot possibly be deemed to have presented a "case or controversy" in that court. If it constituted a case, who were the parties to that case? Against whom was a demand asserted or relief sought? The granting of a license to practice law is in no sense the recovery of a judgment, nor is such granting of such license in the nature of a sentence or decree. It is at the most the granting of a privilege. In short, petitioner's matter did not constitute litigation.

In *Bradwell* v. *Illinois*, 83 U. S. 130, as counsel for petitioner admits, this court held that the right to practice law was not a privilege or immunity within the purview of the Fourteenth Amendment. Counsel for the petitioner states at page 4 of their petition,

> "We have found no case involving admission to the practice of law decided by this court since 1873."

They have evidently overlooked the case of *In re Lockwood*, 154 U. S. 116, decided in 1894, where this court adhered to the decision in the *Bradwell* case and upheld a decision by the Supreme Court of Virginia denying admission to the bar of that state a woman whom was a member of the bar of this court. Although this court had long admitted women to its bar, it sanctioned refusal to admit them to the state bar, even though such refusal was based upon the ground of sex alone.

It is to be noted and emphasized that the ground of the decisions in the *Bradwell* and *Lockwood* cases was *not* that the action of the state courts was reasonable, but was a ground pertinent under the present point; namely, that application for admission to the bar asserted no justiciable claim of a federal constitutional right.

In the *Bradwell* case, the court in effect denied jurisdiction on the ground that no federal question was presented. It was therefore unnecessary for this court to pass upon the further question whether an application for admission to the bar is a case or controversy which is subject to appellate review.

It is the submission of the Justices of the Supreme Court of Illinois that the action of that court in the instant matter was not a determination of a "case or controversy" and is therefore not subject to review by this court in the exercise of appellate, as distinguished from original, jurisdiction.

The instant petition cannot be entertained as an invocation of this court's original jurisdiction without violating Illinois immunity.

But if the instant proceeding is conceived not as the statutory writ of *certiorari* which is in effect a purely appellate proceeding but is viewed as an original proceeding, then jurisdiction must be disavowed because, in order to present a "case or controversy" for original justication, there must be an adversary. The only adversary that can be perceived in the instant case is the State of Illinois. Of course, the State of Illinois is immune to original suit by a citizen. It is not every claim of violation of the Constitution of the United States, even though the claim may be substantial,* that may be exerted in an original proceeding in the federal courts. This court has consistently held that where a claim of constitutional right, even though the claim be well founded, can be determined only by a proceeding which is in effect one against the State, jurisdiction fails if the suitor is not the United States or a State but a citizen.

In *Governor of Georgia* v. *Madrazo*, 26 U. S. 110, and *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, this court

* It is not conceded that the claim is substantial in the instant case.

held that original proceedings, though in form merely against state officials, could not be entertained if in fact the effect of the decision would be to bind the State. To the same effect is *Cunningham* v. *Macon & Brunswick Railroad Company*, 109 U. S. 446.

It is therefore submitted that jurisdiction of this matter, if it exists at all, must necessarily be either appellate or original. Appellate jurisdiction does not exist because the proceedings before the Supreme Court of Illinois, although they involved the discharging of an important function of the judges, did not embody or constitute a "case or controversy" and are therefore not subject to appellate review. Similarly, this proceeding cannot be sustained as an independent and original proceeding, for its only intent and purpose is to bind the State of Illinois by requiring her courts and other governmental officials to recognize petitioner as a member of her bar. Thus, the proceeding, when viewed as an original one, is really directed at Illinois' sovereignty.

Therefore it is the submission of the Justices of the Supreme Court of Illinois that neither appellate nor original jurisdiction obtains in this matter.

This petition can not be entertained as an invocation of either appellate or original jurisdiction because the right of admission to the bar of a state is not a right within the purview of the federal constitution.

In the *Bradwell* and *Lockwood* cases, both cited above, 83 U. S. 130 and 154 U. S. 116, this court held that the right to practice law was not a privilege or immunity within the purview of the Fourteenth Amendment. It is not perceived how the right to be an officer of a court can be claimed as either "liberty" or "property" if it is neither a privilege nor an immunity.

II.

Even if this court had jurisdiction to review the present matter upon the merits, it should deny certiorari because no substantial federal question is involved.

Under the preceding Point, it has been submitted that the action of the Supreme Court of Illinois was not of a character which renders it susceptible to review either by appellate or original proceedings and that therefore this court has no jurisdiction to entertain the present application for *certiorari*. Under the present Point, however, we assume, merely for the sake of argument, that this court has jurisdiction to consider the petitioner's request that it supersede the determination of the Supreme Court of Illinois in the instant matter.

Even under this assumption, it is clear that no substantial federal question is presented.

Before taking cognizance of the provisions of the Illinois Constitution which make it plain that obedience to that constitution is inconsistent with even sincerely conscientious objection to military service, we refer to two cases which are, we submit, decisive of the question which we are now supposing to be within this court's jurisdiction. The first of these cases is *United States* v. *Schwimmer*, 279 U. S. 644. The second is *United States* v. *Macintosh*, 283 U. S. 605. In both of these cases, it was held that an applicant for citizenship, a privilege certainly as precious as a license to practice law, was properly denied naturalization because he (or in the first case, she) would not state that he or she would serve this country in time of war regardless of personal scruples against such service. This conclusion was reached in the absence of requirement in express terms that the applicant be free of such conscientious objec-

tions. It was decided as a logical implication of the requirements of citizenship and of the requirement of good moral character in the civic sense.

It is true that there were dissenting opinions in both cases. It is likewise true that those dissents were written by illustrious jurists, the first dissent being written by Mr. Justice Holmes and the second by Chief Justice Hughes. But even if the dissenting opinions had prevailed, those cases would not sustain the petitioner in the instant case for the following very cogent reasons: In the *first* place, the dissenting opinions are quite as illuminating as the majority opinions; for in neither case do the dissenting jurists suggest that a requirement that an applicant for civil privilege subordinate personal scruple to constitutionally enacted military policy would be unconstitutional if such a requirement had been expressed and not left to inference by construction. On the extreme contrary, Mr. Justice Hughes, in dissenting in the *Macintosh* case, expressly said that the question was not "one of the authority of Congress to exact a promise to bear arms as a condition of its grant of naturalization." He further said: "That authority, for the present purpose, may also be assumed."

No more did Mr. Justice Holmes even intimate, much less declare, that he would strike down as unconstitutional a provision enacted by Congress requiring absolute obedience, regardless of conscientious objection, to military policy as a prerequisite to citizenship. Moreover in the *Schwimmer* case, Mr. Justice Holmes predicated his decision very largely upon the fact, specific in that case and absent here, that the applicant for citizenship was an aged woman who could not under any conceivable circumstances be regarded as actually available for military service in any event.

The majority opinions in the two cases last cited held that a requirement of absolute, rather than conditional, obedience to military policy could be *implied, even in the absence of explicit declaration of congressional policy*, as a prerequisite to citizenship. But in the instant case, this court is not asked, as it was asked in the two cases cited above, to decide for itself whether requirements of "good moral character" and the oath to support the Constitution of Illinois do or do not fairly imply, in the absence of express declaration, an absolute promise of military service. This court is asked only to review determination of the Justices of the Supreme Court of Illinois that, under Illinois' Constitution, the obligation of military service in time of war is absolute and cannot be conditioned upon the scruple of the citizen.

Still another circumstance distinguishes the cited cases from the case at bar. We have said that the right of citizenship is as precious as a license to practice law. In fact, it is of course far more precious, since it is only one of the prerequisites to admission to the bar. **Under the decisions of this court, petitioner, if he were foreign born, could not be admitted to the bar of Illinois because he could not even become a citizen of the United States.** This court's own decisions are authority for the proposition that reservations against compulsory military service, even without an enactment by Congress, are, as a matter of law, an impediment to citizenship. Upon what theory, then, can it be even suggested, much less held, that the Supreme Court of Illinois has acted arbitrarily in ruling that one who, under decisions of this court, lacks the moral requisites of citizenship also lacks the requisites for admission to the bar of Illinois? Why, in other words, should the mere fact that petitioner is a native born citizen entitle him to a privilege which would be denied, along with every

other privilege of citizenship, if, like Macintosh, he had been born in Canada?

Finally, however, we come to a consideration which we submit is absolutely conclusive in its force against the petitioner's contentions here. Applicants for admission to the bar are required to take an oath to support the Constitutions of the United States and of the State of Illinois. Two provisions of the Constitution of the State of Illinois which are pertinent here are as follows:

> "The militia of the state of Illinois shall consist of all able-bodied male persons resident in the state, between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, exempted by the laws of the United States, or of this state." (*Constitution of Illinois*, Art. XII, Sec. 1.)
>
> "No person having conscientious scruples against bearing arms shall be compelled to do militia duty **in time of peace**: *Provided*, such person shall pay an equivalent for such exemption." (*Constitution of Illinois*, Art. XII, Sec. 6.)*

It is quite obvious that the petitioner could not conscientiously abide both by his convictions and his oath to support the constitution of Illinois if the State of Illinois should require his service in time of war.

In Illinois, every able-bodied male citizen between the ages of eighteen and forty-five, except such persons as may be exempted, is a member of the Illinois militia. Petitioner has made no showing that he merely intends to claim the exemption as a conscientious objector *if such exemption is*

* The argument that Congress presently recognizes petitioner's religious scruples is answered *post*, where it is shown (1) that a fairer reading of Illinois' Constitution recognizes petitioner's rights to exemption on religious grounds as a right conditional upon the will of Congress and the legislature; whereas petitioner does not show that his refusal to serve is thus conditional, (2) the present exemption of conscientious objectors is grounded upon considerations of military policy rather than solicitude for religious beliefs, and (3) Illinois indulge no such exemption as to petitioner in time of war.

allowed by law, and that, if not allowed by law, he will yield obedience to the United States or to the State of Illinois.

Since this court cannot infer anything in favor of the petitioner that he has not affirmatively made to appear, it must be presumed that the petitioner, out of scruple and conviction, would feel compelled to assert that his religious principles are paramount to the command of the Constitution of the State of Illinois and to the power of the government of the United States. This the present act of Congress permits him to do so far as federal military service is concerned.

But the present act of Congress does not require petitioner to take an oath to support the provisions of the Constitution of the State of Illinois, which negatives exemption on the ground of conscientious objection from state military service. Application for admission to the bar does, however, entail such requirement.

Moreover, the present act of Congress, even so far as it applies to federal military service, represents no more than a temporary provision which exempts petitioner from federal military service so long as it is not repealed. Petitioner has made no showing that his refusal to serve in the armed forces is conditional upon continued recognition of his religious persuasions as a ground of exemption. It is a fair inference, not rebutted by petitioner, who would have the burden of proof upon the issue since he alone knows the content of his creed, that if he is really convinced that God has commanded him not to serve in the army, he would not disobey his conception of God's command out of regard for what, to him, would logically appeal to be only man-made law.

Furthermore, it does not appear that Congress, in declaring that one young man might, by the assertion of even sincere religious convictions, require another young

man, who did not hold such convictions, to be slain in his place, was actuated by the slightest sentiment or compunction for the personal liberty of the conscientious objector. That provision may as well be sustained as a declaration of a coldly calculated military policy which views those who believe themselves to have commands from God inconsistent with commands from their country to be undesirable soldiers. Exemption from military services is not ordinarily regarded as, on the one hand, a special privilege of the individual, or, upon the other hand, as a punishment of the individual. It is true that both clergymen, who are usually highly venerated, and confirmed felons, who are usually utterly despised and ~~execrated~~ execrated are exempted from military service. So are the physically unfit, those over age, illiterates and feebleminded persons, as well as those engaged in essential civilian activities and those whose conscription would work a severe hardship. In none of these cases can it be said, however, that exclusion from the armed forces is either indulged as a personal exemption from military burdens or is inflicted as a deprivation of the benefits of military honor. It is military policy, not the rights of the individual, that dictates exclusion from military service. Therefore, petitioner's contention that Congress has respected his religious rights has no clear basis in any utterance of federal legislation.

The possibility that petitioner might be called upon to obey Article XII of the Constitution of the State of Illinois, even though he was not a member of the armed forces of the United States, is not fanciful. This court will take judicial notice that the City of Chicago, like other large cities in the United States, has actively exploited unmobilized personnel in such military activities as watching for the approach of enemy planes with a view to the destruction of such planes by warfare. Although happily

these precautions, at least so far as Chicago is concerned, have been found unnecessary, nevertheless they emphasize that in time of war military service by unmobilized civilians may become necessary.

Even if this court has jurisdiction of this matter (and we deny the existence of such jurisdiction), it is not asked to decide whether petitioner should be admitted to the bar of Illinois. It is asked to decide whether the Supreme Court of Illinois acted arbitrarily in holding that one who cannot take an unqualified, unreserved and categorical oath to obey specific provisions of the Illinois Constitution and who, if he were not a citizen by birth, could not even take the oath of allegiance prerequisite to naturalization may not, in time of war, receive a license to practice law. We submit that this question admits of only one answer, which answer is adverse to petitioner.

Conclusion.

For the foregoing reasons, it is respectfully submitted by the Justices of the Supreme Court of Illinois that they have made due and proper return to the rule of this court, that the same should be deemed satisfied and discharged, and that the petition should be dismissed.

Respectfully submitted,

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Attorney for Respondents.

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APPENDIX I.

RULES OF PRACTICE AND PROCEDURE OF THE SUPREME COURT OF ILLINOIS.

Rule 58.

Admission to the Bar.

The following order was entered by the Court on January 21, 1942:

Order.

It is ordered that for the duration of the war and until the further order of the Court, the Board of Law Examiners is authorized to administer Rule 58 governing admission to the bar as follows:

(1) The final semester of law school study may be waived in the case of applicants for the bar examination who are about to enter the armed forces of the United States and will for that reason be unable to complete their law studies in accordance with the present requirements of the rule.

(2) Applicants failing to pass a satisfactory examination in September or December, 1941, or thereafter while the United States is at war, who enter the armed forces of the United States before the examination next following such failure, shall be re-examined only in the subjects on which they failed to pass a satisfactory examination. The first re-examination shall be without additional fee.

(3) Law students about to enter the armed forces of the United States who have satisfactorily completed two-thirds of the work required for graduation from law school, as evidenced by certificate of a law school or schools, may be permitted to enter the bar examination to be examined, however, only on the subjects enumerated in Rule 58 which they have completed. If they enter the armed forces before they have completed their law study in accordance with Rule 58, they shall be re-examined for admission to the bar after

completion of the required law study only in the subjects on which they failed to pass a satisfactory examination and the subjects in which they were not previously examined. The filing fee in such cases shall be $20.00 and no fee shall be required for the first re-examination.

(4) In addition to the two examinations prescribed by Rule 58, the Board of Law Examiners may in its discretion conduct other examinations and all such examinations may be held at such times and at such places as the Board of Law Examiners shall deem proper. (Order of January 21, 1942.)

SECTION I.—*General Qualifications.*

Persons may be admitted to practice as attorneys and counselors-at-law in this State if they are citizens of the United States, at least twenty-one years of age, of good moral character and have satisfactorily passed an examination before the Board of Law Examiners or have been licensed to practice law in another state, territory, the District of Columbia or in certain foreign jurisdictions. All subject, however, to the terms and requirements hereinafter contained in this rule.

SECTION II.—*Board of Law Examiners.*

1. The present members of the Board of Law Examiners shall be continued in office until the expiration of the terms for which they were appointed. The Board shall thereafter consist of five members of the Bar, appointed by the Supreme Court, and each shall serve a term of three years and until his successor is duly appointed and qualified. Two members of the Board shall be appointed from the First Appellate Court District and one member from each of the Second, Third and Fourth Appellate Court Districts. Each member of the Board, upon his appointment, shall make and file with the Clerk of the Supreme Court his oath faithfully to discharge the duties of his office.

2. A majority of the Board shall constitute a quorum. A President, Secretary and Treasurer shall be annually elected. One member may hold the office of both Secretary and Treasurer.

3. The members of the Board and the officers thereof shall receive such salaries as the Court may provide and such further sum for necessary disbursements as may be approved by the Court, all payable out of moneys received from applicants for admission to the Bar as fees for examination and admission.

4. The Board shall audit annually the accounts of its Treasurer and shall report to the Court at each November term a detailed statement of its finances, together with such recommendations as shall seem advisable. All fees paid into the Board in excess of its expenses shall be applied as the Court may from time to time direct.

SECTION III.—*Educational Requirements.*

Every applicant seeking admission to the Bar of Illinois on examination shall meet the following educational requirements and shall make proof thereof in the manner following:

1. Preliminary and college work: Each applicant shall have graduated from a four year high school or other preparatory school whose graduates are admitted on diploma to the freshman class of any college or university having admission requirements equivalent to those of the University of Illinois; and after such high school or preparatory school graduation shall have satisfactorily completed at least seventy-two weeks of general college work while in actual attendance at one or more colleges or universities accredited by the Board of Law Examiners, or shall have completed such work as is recognized by the Board as the equivalent of such general college work.

Proof: Proof of such preliminary education shall be made either by diploma showing such graduation or by certificate that the applicant has become entitled to enter such college or university, signed by the Registrar thereof. Proof of the satisfactory completion of such college work shall be made either by certificate that the applicant has satisfactorily completed such work, or in lieu of such certificate, the applicant must pass an examination given by or under the direction and supervision of the Board of Law Exam-

iners a course of studies to be approved by the Board as the equivalent of such seventy-two weeks of college study. The Board by rule may recommend certain subjects, but shall not specifically require any particular group of studies, as the equivalent of such seventy-two weeks of general college work.

2. *Legal Education:* After the completion of both the preliminary and college work above set forth in Paragraph 1 of this Section, each applicant within the period of six years immediately prior to making application shall have pursued a course of law studies by one of the following methods, of which proof thereof, respectively, shall be made in the manner following:

A. *Law School Study:* Such course of law studies shall have been pursued by the applicant in one or more established law schools accredited by the Board of Law Examiners, and shall aggregate at least 1,296 class room hours. In computing such number of class room hours, credit shall be allowed for no more than five hundred forty class room hours in any period of one scholastic year; but if during any such week or weeks a major portion of such class room hours shall be after four o'clock in the afternoon, then credit shall be allowed for no more than three hundred fifty-one class room hours during the period of one year. It shall be required that the applicant shall have passed satisfactory examinations in each of the law studies aggregating said twelve hundred ninety-six class room hours. Proof of such law school study shall be made by certificates from such law school or schools.

B. *Law-office Study:* Such course of law studies, embracing the subjects herein enumerated and such further law studies as shall be prescribed by the Board of Law Examiners as the equivalent of the law school study above provided, shall have been pursued by the applicant, after registering with the Board of Law Examiners at the beginning of such course of law studies, while actually engaged during usual business hours as a law clerk or in a similar capacity in a law office and under the personal tuition of a licensed attorney or attorneys in active practice in the State of Illinois for a period of four years during at least thirty-six

weeks in each year, and such applicant shall have satisfactorily passed monthly written or oral examinations in each subject given under the direction of such attorney or attorneys.

Proof: Proof of such law studies shall be made by (1) filing with the Board of Law Examiners prior to the beginning of such course of law studies, a registration statement by the applicant specifying the date on which such law studies are to commence, the name and address of such attorney or attorneys under whom he will study and such other relevant facts as the Board may require, and an undertaking by such attorney or attorneys faithfully to give such instruction and such examinations, specifying the books to be used and method of instruction to be employed, the approximate dates on which such examinations are to be held and such other relevant facts as the Board may require; and (2) filing with the Board of Law Examiners at the conclusion of such law office study the affidavit of such attorney or attorneys showing a full compliance with this provision. If, in consequence of the death or absence from the State of any such attorney, his affidavit cannot be procured, such proof, subject to the approval of the Board of Law Examiners, may be made by affidavit of any credible witness having personal knowledge of the facts. The applicant may be required by the Board of Law Examiners to take an examination under the supervision of the Board once each year during the first three years of such law office study.

C. *Combined Law School and Law-office Study:* In the event an applicant shall have pursued a course of law studies partly in a law school and partly in a law office as above provided, then, to meet the requirements of this rule, the applicant shall have pursued such course of law studies for a period of four years during at least thirty-six weeks in each year. The applicant shall be allowed credit for his law school study upon presentation of a certificate from such law school or schools showing the studies taken therein by personal attendance, the number of classroom hours and weeks of law study pursued, and the passing of satisfactory examinations in such studies and the applicant shall

be allowed credit for his law office study when proof thereof is made as above provided.

3. The Board of Law Examiners in their discretion may waive the six-year requirement of paragraph 2 of Section III in the case of any applicant who meets the other requirements of this section and who has been admitted to practice in a foreign jurisdiction, but who has not practiced there for the required period of time to gain admission in Illinois on a foreign license.

SECTION IV.—*Qualification on Examination.*

1. Any person who meets the educational requirements set forth in Section III of this rule may make application to the Board of Law Examiners for admission to the Illinois Bar on examination.

2. Applications shall be in such form as the Board shall prescribe and shall be accompanied with proof that the applicant meets the requirements of Section I of this rule, together with proof of his educational qualifications. In the event the proof shall be satisfactory to the Board of Law Examiners, the applicant shall be admitted to examination.

3. The Board of Law Examiners shall conduct two examinations annually—in Chicago in September and in Springfield in March, on the first Tuesday in each of said months, unless the Board shall fix a different place and shall give to all applicants not less than thirty days' notice of such change. The examinations shall be conducted under the supervision of the Board by uniform printed interrogatories, and by such additional or supplemental methods as the Board may prescribe. The examinations may be upon the following subjects: The law of real and personal property, persons and domestic relations, torts, contracts, partnerships, bailments, negotiable instruments, agency, suretyship, wills, private and municipal corporations, equity jurisprudence, crimes, conflict of laws, evidence, administrative law, law and equity pleading practice and procedure, the federal and state constitution, and legal ethics.

4. If an applicant fails to pass his first examination, he may be permitted to take successive examinations provided he furnishes the Board with satisfactory evidence of diligent study of the law since his prior examination. An applicant who has been rejected at a fifth examination shall not again be admitted to an examination except upon the permission of the Board of Law Examiners or the Supreme Court. The Board or Court so granting the permission may, as a condition to the granting of another examination, prescribe a further course of study and fix the time when such examination may be taken.

5. The Board shall certify to the court the name of every person who has passed the Bar examination and is ready for admission.

SECTION V.—*Qualification on Foreign License.*

1. Any person who has been admitted to practice in the highest court of law in any other state or territory of the United States or the District of Columbia, or admitted to practice as an attorney and counselor-at-law (or the equivalent) in another country whose jurisprudence is based upon the principles of the English Common Law, may make application to the Board of Law Examiners for admission to the Bar without examination upon any one of the following conditions:

(a) If the requirements for admission in such other jurisdiction at the time of the applicant's admission there were equivalent to the requirements prescribed by this rule;

(b) If the applicant while an actual resident in such other jurisdiction and having been admitted there under a rule requiring not less than two years of law study, has actively practiced law in such other jurisdiction for at least five years within the period of seven years immediately prior to making application in Illinois;

(c) If the applicant while an actual resident in such other jurisdiction and having been admitted there under a rule which does not require at least two years

of law study, has actively practiced law in such other jurisdiction not less than eight years within the period of ten years immediately prior to making application in Illinois.

2. Applications shall be in such form as the Board shall prescribe and shall be accompanied with proof that the applicant meets the requirements of Section I of this rule, together with proof of such residence, admission to practice, and, if required, of such practice; and such proof shall be supported by a certificate of a judge of the highest court in such other jurisdiction certifying that the applicant has been so admitted and is of good moral character. Such certificate shall be certified by the Clerk of the Court and sealed with a seal thereof.

3. In the event the Board of Law Examiners shall find that such applicant meets the requirements of this rule and has received from the Committee on Character and Fitness its certification of approved character, the Board shall certify to the Court that such applicant is qualified for admission on a foreign license.

SECTION VI.—*Fees of Applicants.*

1. Each applicant for admission to the Bar on examination shall pay in advance a fee of twenty dollars, and a similar fee for each subsequent examination.

2. Each applicant for admission to the Bar on a foreign license shall pay in advance a fee of one hundred dollars.

3. Each applicant for examination on preliminary education or on law office study, as provided in this rule, shall pay in advance a fee of ten dollars.

4. All fees shall be paid to the Treasurer of the Board to be held by him subject to the order of the Court.

SECTION VII.—*Foreign Attorneys in Isolated Cases.*

Anything in this rule to the contrary notwithstanding, an attorney and counselor-at-law from any other jurisdiction in the United States, or foreign country, may, in the

discretion of any court of record of this state be permitted to participate before such court in the trial or argument of any particular cause in which, for the time being, he is employed.

SECTION VIII.—*Qualifications Under Prior Rules.*

Applicants who commenced the study of law prior to the effective date of this rule and applicants heretofore examined and entitled to re-examination, may qualify for examination or re-examination under the provisions of the rules of this court in force at the date when they commenced the study of law.

SECTION IX.—*Committee on Character and Fitness.*

1. At the November term in each year, the Supreme Court shall appoint a Committee on Character and Fitness in each of the Appellate Court Districts of this State, consisting of not less than three members of the Bar. The members of the Board of Law Examiners appointed for their respective districts shall be ex officio members of the Committee.

2. Before admission to the Bar, each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. He shall furnish the Committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning his history and environments, together with the affidavits of at least three reputable persons personally acquainted with him residing in the county in which the applicant resides, each testifying that the applicant is known to the affiant to be of good moral character and general fitness to practice law, setting forth in detail the facts upon which such knowledge is based. Each applicant shall appear before the Committee of his district or some member thereof and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the Bar.

3. If the Committee is of the opinion that the applicant is of approved character and moral fitness, it shall so cer-

tify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the Bar.

SECTION X.—*Power to Make Rules, Investigations and Subpoena Witnesses.*

1. Subject to the approval of the Supreme Court, the Board of Law Examiners and the Committee on Character and Fitness shall have power to make, adopt and alter rules not inconsistent with this rule, for the proper performance of their respective functions.

2. The Board of Law Examiners and the Committee on Character and Fitness for each Appellate Court District are hereby respectively constituted bodies of commissioners of this court, who are hereby empowered and charged to receive and entertain complaints, to make inquiries and investigations, and to take proof from time to time as may be necessary, concerning applications for admission to the Bar relative to examinations given by or under the supervision of the Board of Law Examiners and relating to the character and moral fitness of applicants for admission. They may call to their assistance in such inquiries other members of the Bar and make all necessary rules and regulations concerning the conduct of such inquiries and investigations, and take the testimony of witnesses as hereinafter provided. The hearings before the Commissioners shall be private unless any applicant concerned shall request that they be public. Upon application by the Commissioners, the Clerk of this Court shall issue writs of subpoena ad testificandum, writs of subpoena duces tecum or dedimus potestatem to take depositions. Witnesses shall be sworn by any person authorized by law to administer oaths. All testimony shall be taken under oath, transcribed, and transmitted to the Court, if requested. The Commissioners shall report to this court the failure or refusal of any person to attend and testify in response to any subpoena issued as herein provided.